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No. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONSTABLE WALTER H. RANKIN, *et al.*,
Petitioners,

v.

ARDITH MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
CYNTHIA L. ESTLUND
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)
Attorneys for Amicus Curiae
National Education Association

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The National Education Association files this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The National Education Association (NEA) is the largest public employee organization in the United States, with approximately 1.8 million members, virtually all of whom are employed by public educational institutions. One of NEA's principal purposes is to safeguard the constitutional rights of its members in matters pertaining to their employment.

SUMMARY OF ARGUMENT

Plaintiff was discharged from her clerical position in the Constable's office because the Constable determined that she "meant it" when she stated, in a private conversation with her boyfriend, that she opposed the policies of President Reagan to such an extent that "if they [attempt to assassinate] him again, [she hoped] they

[would] get him." No one would dispute that the view plaintiff expressed in that regard was "repulsive, nigh obscene," JA 129, but it likewise is beyond dispute that the expression of such views is constitutionally protected in the sense that plaintiff could not be subject to criminal or civil penalties for the view she expressed. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Nor, as a general proposition, may a person be discharged from public employment for holding or expressing such constitutionally protected views (*Perry v. Sindermann*, 408 U.S. 593 (1972)), unless it is established in a particular case that the employee's First Amendment interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The court of appeals determined in this case that the *Pickering* test was applicable, and that plaintiff's First Amendment interests outweighed the interests put forward by the Constable in his attempt to justify plaintiff's discharge. In their challenge to the court's conclusion, the Constable and the Solicitor General both contend that the *Pickering* balance should have been drawn in favor of the Constable. And, seeking to inject a threshold issue into the case, the Solicitor General further contends that this case falls into the limited category discussed in *Connick v. Myers*, 461 U.S. 138 (1983), in which the First Amendment permits the discharge of a public employee on the basis of his speech without regard to the reasons for the discharge, and without resort to the *Pickering* test. Both of those contentions are wrong.

1. The Solicitor General misconceives the holding of *Connick*. In that case the Court, recognizing that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," 461 U.S. at 149, held that when an employee speaks about "an employee grievance" (*id.* at 147, 148, 154) which is only of "personal interest" (*id.*

at 147) and "cannot be fairly considered as relating to any matter of political, social or other concern to the community" (*id.* at 146), the employee may be discharged without any requirement that the discharge be justified by reference to any particularized governmental interests.

This case, however, does not involve speech over "internal office affairs" or an "employee grievance," and for that reason alone the *Connick* limitation is inapplicable here. Furthermore, this case *does* involve the expression of views relating to "a matter of political, social or other concern to the community." Even if plaintiff's speech were artificially divorced from its context (a discussion criticizing Reagan administration social and economic policies), it would remain *political* expression, involving "a matter inherently of public concern." (*Connick*, 461 U.S. at 148 n. 8.) The Solicitor General's principal argument to the contrary—i.e., that plaintiff's speech did not involve a matter of "legitimate" public concern—is nothing more than a dressed-up claim that plaintiff's views are so intolerable that they ought not be heard. *Connick* lends no support to that contention, which runs contrary to the very essence of the First Amendment. *E.g.*, *Healy v. James*, 408 U.S. 169, 188 (1972).

Nor does *Connick* support the Solicitor General's suggestion that plaintiff's speech did not relate to a matter of public concern because it did not involve the communication of information to the general public. Although such a consideration would be relevant where, as in *Connick*, it is ambiguous whether the subject of an employee's remark is a matter of public or purely private concern, in the case at hand, where the views expressed by the plaintiff relate to a matter of *inherent* public concern, it is of no moment that plaintiff did not seek to communicate information to the general public. *Cf. Givhan v. Western Line Consol. Sch. Distr.*, 439 U.S. 410 (1979). Under the contrary view espoused by the Solicitor General, public employers would have *carte*

blanche to fire employees for stating an opinion on any subject; for unless the opinion were expressed in such a way as to convey information to the general public, it would not rise to the level of "public concern" as defined by the Solicitor General. *Connick* does not establish such a sweeping rule.

2. Because plaintiff's speech did not relate to a personal employment dispute, but related instead to a matter of public concern, it is necessary "to scrutinize the reasons for [plaintiff's] discharge." *Connick*, 461 U.S. at 146.

The Constable's reason for discharging plaintiff—that he "lost all confidence in her"—reduces to the claim that one who holds plaintiff's view cannot be trusted to perform the duties of her position. The First Amendment, however, prohibits the dismissal of a public employee because of governmental disapproval of her beliefs, unless those beliefs would in fact "interfere with the discharge of [her] public duties." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). The court of appeals correctly determined that such is not the case here: "[h]owever ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office," JA 136.

Nor is there any merit to the Solicitor General's alternative contention that plaintiff's discharge was justified because her remark threatened to destroy public confidence in the Constable's office. The Constable did not purport to fire plaintiff for that reason. And in any event, the record belies the Solicitor General's contention that the interest of the Constable's office in maintaining public confidence was implicated in any way by plaintiff's views. There was no reasonable likelihood that plaintiff's remark would come to the attention of the public or, if it did, that the public would lose confidence in the Constable as a result of this remark by a clerical employee which did not even relate to the business of the agency.

There is consequently no occasion to consider in this case how the interest of a government agency in maintaining public confidence would be weighed in the *Pickering* balance if that interest were truly implicated by an employee's expression of a particular belief. In such a case, difficult questions would arise as to whether the government's reliance on asserted public opinion could be reconciled with the First Amendment's protection of "the right of individuals to hold a point of view different from the majority." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). And even if that problem could be put aside, vexing questions would remain as to the circumstances, if any, in which the discharge of a public employee for expressing views on a matter of public concern could be deemed to be justified by the government's fear that the public might *erroneously* conclude that the employee's beliefs were inconsistent with the proper functioning of the agency. To reach "the most appropriate possible balance of the competing interests" in such a situation (*Connick*, 461 U.S. at 150) would present a complex task, which need not be assayed in this case because the government's interest in maintaining public confidence was not implicated at all by plaintiff's speech.

For these reasons, the court of appeals was correct in concluding that the First Amendment interests of the plaintiff in holding and expressing views on a matter of public concern outweighed the interests asserted by the Constable for discharging her on that ground.

ARGUMENT

BY DISCHARGING PLAINTIFF FOR THE OPINION SHE EXPRESSED, THE CONSTABLE DEPRIVED PLAINTIFF OF HER CONSTITUTIONAL RIGHT OF FREE EXPRESSION

A. Introduction

On March 30, 1981, upon hearing a report that an assassination attempt had been made on President Reagan, plaintiff-respondent Ardith McPherson ("plaintiff")

engaged in a brief and what she thought was a private conversation with her boyfriend, Lawrence Jackson.[1] In that conversation, plaintiff expressed her opinion that the assassin (whose identity at that time was unknown) was probably animated by hostility toward President Reagan's social policies, and in particular his proposal to cut back funds for job training, welfare, food stamps, medicaid and other such programs.[2] Plaintiff viewed those cutbacks as "wrong" and they "anger[ed]" her, because plaintiff, a black woman, felt that the programs targeted for cuts were ones that "black people depend on a lot".[3] "Plaintiff concluded [this] discussion . . . about th[e assassination attempt] and about Reagan administration economic policies with the statement, 'I hope if they go for him (President Reagan) again, they get him." JA 38 (District Court Memorandum Opinion of April 15, 1983, Finding ¶ 12). For expressing this opinion—and for repeating it to the Constable, at his request[4]—plaintiff was discharged. That discharge is the subject of the instant proceeding.

It is important to be clear, at the threshold, what is—and equally important, what is not—at issue here. To

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[1] Hearing of January 21, 1985, Tr. at 67, 74, 144.

[2] *Id.* at 73-74, 144-45.

[3] Hearing of February 14, 1983, Tr. at 14-15.

[4] The Constable explained at trial that, upon hearing a report of plaintiff's remark (which had been overheard by another employee), the Constable called plaintiff into his office and asked her whether she, in fact, hoped that if another assassination attempt were made it would be successful; plaintiff answered in the affirmative. The Constable testified that "[r]ight then is when I lost confidence with her, and I told her that I didn't have a position in that office for her any more" JA 86. The Constable added that "I based my action on a statement that was made to me direct," *id.*, and that he "was not concerned who she [plaintiff] had [originally] made the remark to," *id.* at 83, or with "whether the work was interrupted or not" by plaintiff's remark, *id.* at 86, because "I was interested in the remark was made to me direct. After she satisfied my mind, face to face, tht she meant what she said, then I did not go any further with it." JA 84.

begin with, this case does not raise any question as to whether a public employee may be discharged for threatening to do harm to the President (or to anyone else for that matter); the district court expressly found that plaintiff was *not* "threatening to do harm to the President." JA 119. Similarly, no question is presented here as to whether a public employee who advocates assassination (or other such crime) may be discharged, because plaintiff's statement to her boyfriend did not urge him (or anyone else) to engage in any such conduct. What plaintiff said, in context, is that she was so opposed to the President and his policies that she believed the President's death—and even a violent death—were preferable to a continuation of the Reagan administration. This is what we understand the district court to have meant when that court found that, although plaintiff's statement was *non*-threatening, her words "expressed *such dislike of a high public government official* as to be violent words in context," JA 119 (emphasis added).[5]

There is no doubt that plaintiff's statement, notwithstanding the "repulsive, nigh obscene," views she expressed, JA 129, is constitutionally protected in the sense that plaintiff could not be subject to criminal or civil penalties for the view she expressed. The First Amend-

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[5] It is worth noting that statements of the type made by plaintiff have not been uncommon in our history. *See Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas, J., concurring). The Solicitor General's attempt to analogize plaintiff's statement to "fighting words and incitement to riot," Br. of the United States at 17, is wide of the mark. As the Solicitor General states, such speech has been held unprotected because of its "potential 'emotive' *effects*," *ibid.* (emphasis added). Although plaintiff's speech, like the speech in *Cohen v. California*, 403 U.S. 15, 26 (1971), has an " 'emotive' aspect," Br. of the United States at 17, plaintiff's speech had no potential to cause emotional *actions*. Because it is solely that potential which justifies the denial of protection to "fighting words" and the like, *see Cohen, supra*, 403 U.S. at 20; *Gooding v. Wilson*, 405 U.S. 518 (1972), to state that plaintiff's speech was "not more than one step removed from those forms of expression," Br. for the United States at 17, is like saying that night is not more than one step removed from day.

ment protects "individual freedom of mind," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)—"not free thought for those who agree with us but freedom for the thought that we hate," *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).[6] And that Amendment likewise protects the right to express "hateful" thoughts (or to express thoughts in hateful ways), and even to advocate hateful actions, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).[7] As the Court has explained, the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

> "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." [*Id.* at 269-270; citations omitted.]

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[6] *See also, e.g., Board of Education v. Barnette*, 319 U.S. 624 (1943); *Street v. New York*, 394 U.S. 576, 593-94 (1969); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Healy v. James*, 408 U.S. 169, 187-88 (1972). *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969).

[7] *See also, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1952) ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment"); *Cary v. Population Services International*, 431 U.S. 678, 701 and n. 28 (1977); *Hess v. Indiana*, 414 U.S. 105 (1973).

The same protection to speak one's mind has been afforded to public employees—even where the speech at issue relates to the use of force or violation of law. As the Court stated in *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 448-49 (1974):

> The principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [*Brandenberg v. Ohio*, *supra*, 395 U.S. at 447] has been applied not only to statutes that directly forbid or proscribe advocacy . . . , but also to regulatory schemes that determine eligibility for public employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *see also United States v. Robel*, 389 U.S. 258 (1967).

Notwithstanding the foregoing, the Constable, supported by the Solicitor General, argues that in this case the State was permitted to impose "employment-related sanctions . . . on the basis of [plaintiff's] statement[]," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 n.22 (1984). Two alternative arguments are advanced in defense of the State's power. First, the Solicitor General argues that plaintiff's free speech interest was so insubstantial as to permit the discharge without regard to the nature of any particular countervailing interest of the government; the Solicitor General claims to find authority for this argument in *Connick v. Myers*, 461 U.S. 138 (1983). Second, the Constable and the Solicitor General both contend that plaintiff's speech threatened "the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees" to such an extent as to justify her discharge under the balancing test stated in *Pickering v. Board of Education*, 391 U.S. 563,

568 (1968), quoted *infra*. We treat with these two arguments *seriatim*.

B. The *Connick* Issue

(1) For the past four decades, this Court

> has made clear that even though a person has no "right" to a valuable governmental benefit and even though government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible. [*Perry v. Sindermann*, 408 U.S. 593, 597 (1972).]

Given these principles, the mode of analysis the Court has applied in cases in which the state has denied a benefit on the basis of expressive activity has been precisely the same as the mode of analysis applied when the state attempts to criminalize such activity. Recognizing that First Amendment freedoms are not absolute in nature and that "a reconciliation must be effected" between constitutional interests and governmental powers, the Court first "requires an appropriate weighing of the respective interests involved." *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961). If, as a result of that balancing process it is determined that "the constitutional protection exists it must prevail," *id.* at 49, and the governmental action therefore is struck down.

In *Pickering*, the Court applied these general principles in the context of governmental action "regulating the speech of its employees." 391 U.S. at 568. Recognizing that the government's "interests as an employer

. . . differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," the Court held:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [*Id.*]

The Court added: "we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all [public employee] statements may be judged." *Id.* at 569. *Pickering* thus requires the courts to engage in "particularized balancing" on a case-by-case basis in order to "reach the most appropriate possible balance of the competing interests." *Connick v. Myers, supra*, 461 U.S. at 150.

In *Connick* the Court held that there is a particular category of cases—described in various terms in the course of the opinion—in which this "particularized," case-by-case balancing is *not* required; rather, public employee speech falling into this category "may be considered unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements," *Bose Corp. v. Consumers Union, supra*, 466 U.S. at 504-05 n. 22, without regard "to the reasons for [the] discharge," *Connick*, 461 U.S. at 146. The Solicitor General contends that the instant case falls into this special category and that therefore plaintiff was properly sanctioned for the view she expressed even if no demonstrated governmental interest was implicated by her speech. As we proceed to show, the Solicitor General is mistaken.

(2) In *Connick*, an assistant district attorney, Sheila Myers, was fired because, upon being involuntarily transferred from one section of her office to another, she had prepared and distributed a questionnaire "soliciting the views of her fellow staff members concerning office trans-

fer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. The lower courts found that the discharge violated Myers' First Amendment right as framed in *Pickering* "to comment on matters of public interest in connection with the operation of the public [agency] in which [she] work[s]." 391 U.S. at 568. On review in this Court, district attorney Connick "contend[ed] at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of 'public concern,' as the term was used in *Pickering*." 461 U.S. at 143. The Court found "much force to Connick's submission." *Id.* Proceeding from the premise that "government offices could not function if every employment decision became a constitutional matter," the Court reasoned that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community"—when the speech does "not touch[] upon a matter of public concern"—"government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment," *id.* at 146-47. The Court therefore announced the following holding:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, *but instead as an employee upon matters only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity *for employee grievances* not afforded by the First Amendment to those who do not work for the State. [*Id.* at 147; emphasis added.]

Applying this holding to the facts in *Connick*, the Court concluded, based on "the content, form and context" of Myer's questionnaire, *id.* at 147-48, that in the main the questionnaire was speech "as an employee upon matters only of personal interest" and was not "relat[ed] to any matter of political, social or other concern to the community." The Court reasoned that although "discussions of office morale and discipline could be matters of public concern," *id.* at 148-49 n. 8, Myers' questionnaire "is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154. The questionnaire was an "extension[] of Myers' dispute over her transfer" and was an attempt to "gather ammunition for another round of controversy with her supervisors," and "to turn [her] displeasure [over her transfer] into a cause celebre." *Id.* at 148. In this context, the Court stated that:

> [I]t would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs *were confused with the attempt to constitutionalize the employee grievance that we see presented here.* [*Id.* at 154; emphasis added.]

(3) Fairly read, we submit, *Connick* creates a narrow exception to the general First Amendment rule that prohibits the States from penalizing a citizen for her beliefs, or speech, absent a particularized showing that the state interests in so doing outweigh the individual's First Amendment interest. That exception, as established in *Connick*, is limited to cases involving speech "tied to a personal employment dispute," *Connick*, 461 U.S. at 148 n.8, which in that sense is "only of personal interest," *id.* at 147. Time and again the Court stressed that what was involved in *Connick* was an "employee grievance," *id.* at 147, 148, 154.[8] As the Court put it, "the First Amend-

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[8] *See also Bose Corp. v. Consumers Union, supra*, 466 U.S. at 504 n. 22 (*Connick* exception applies to "[s]tatements made by public

ment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," *id.* at 149. The Court's concern in *Connick* was that if Myers' discharge were subject to that type of balancing, this would mean that whenever a public employer took a personnel action with respect to an employee (*e.g.*, Myers' involuntary transfer), the employee's refusal to accept that decision would become a matter of constitutional moment, and the employer's interest in requiring adherence to its resolution of routine employee grievances would become subject to "intrusive oversight by the judiciary," *id.* at 147.

This case does not involve speech over "internal office affairs" or an "employee grievance." *Connick*'s discussion of the limitations that apply to First Amendment claims asserted in such a context therefore has no application here. Accordingly, in this case the controlling precedent is *Pickering* which, as the Court in *Connick* acknowledged, requires a "particularized balancing" of interests. 461 U.S. at 150.

(4) Even if, contrary to what we have just shown, the *Connick* rule were read to apply outside the category of employee grievances,[9] that rule still would not be appli-

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employees *in their employment capacity* and not touching on matters of public concern" (emphasis added)).

[9] The Solicitor General attempts to extract from *Dun & Bradstreet v. Greenmoss*, —— U.S. ——, 53 L.W. 4866 (June 26, 1985), the proposition that unless an employee's speech is deemed to be of public moment, the employee may be subjected to discharge or other employment sanctions by the government for uttering an opinion with which the employing agency disagrees, even if the employee's speech does not relate, as in *Connick*, to a "personal employment dispute," 461 U.S. at 148 n. 8, and even in the absence of a showing of a countervailing governmental interest. *See* Br. for the United States at 14. The Solicitor General's reliance on *Dun & Bradstreet* is misplaced. That case involved speech which was false and defamatory, and the Court has long held that "the erroneous statement of fact is not worthy of constitutional pro-

cable here. For as we proceed to show, plaintiff's speech unquestionably related to a "matter of political, social or other concern to the community," *Connick*, 461 U.S. at 147.

(a) By its very nature, a statement expressing the speaker's view of the desirability of a government official dying, or being assassinated, is *political* expression: such a statement necessarily communicates the speaker's view of the official and his policies or actions. And that is especially true in this case because, as the district court found, plaintiff's statement was made in the course of a discussion about "the assassination attempt on President Reagan . . . and the Reagan administration policies." By any definition, these are subjects of *public* rather than private concern. And thus the view plaintiff expressed in that conversation—that Reagan Administration policies were so abhorrent to her that if another

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tection." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The issue in *Dun & Bradstreet*, therefore, was whether to "extend a measure of *strategic* protection to defamatory falsehood" in order to "assure to freedom of speech and press that 'breathing space' essential to their fruitful exercise," *Gertz*, 418 U.S. at 342 (emphasis added); because the speech in *Dun & Bradstreet* did not touch upon any matter of public concern, the Court decided not to afford "strategic protection" to that speech. That holding has no relevance to situations in which a public employee has engaged in speech which, although not addressed to a public issue, nonetheless *is* constitutionally protected, and the question is whether to permit the state to impose employment-related sanctions on the employee for the speech.

Thus, *Connick* and *Dun & Bradstreet* cannot fairly be read as resolving the scope of a public employer's power to impose employment-related sanctions on an employee for speech, even of a private nature, which does not relate to "a personal employment dispute," *Connick, supra*. The case which comes closest to dealing with such a situation is *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), in which a teacher was discharged for speech pertaining to a teacher dress code in the high school. It is far from clear to us that such speech is of "public concern" in the sense that the Solicitor General uses that term, yet the Court in *Mount Healthy*, applying *Pickering*, found the discharge unconstitutional.

assassination attempt was made, she desired to see it succeed—likewise cannot be considered unrelated to a "matter of political, social or other concern to the community," no matter how loathsome that view may be.[10]

(b) The Solicitor General states his contrary contention as follows:

> The intellectual discourse of our democratic body politic is in no way advanced, and may even be retarded, by the expression of sentiments like those respondent uttered. Our society has never considered assassination of public officials to be a viable or tolerable means of "bringing about * * * political and social changes desired by the people" and has never treated expression favoring assassination as an instance of rational or legitimate debate. Accordingly, respondent's statement cannot properly be said to be protected because it addresses "a matter of legitimate public concern." [Br. of the United States at 15-16; citations omitted.]

In other words, the Solicitor General reaches the conclusion that plaintiff's words are not addressed to a "matter of legitimate public concern" by focusing on the viewpoint plaintiff expressed; presumably, the Solicitor Gen-

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[10] The Solicitor General attempts to sever plaintiff's statement from its context, arguing that plaintiff's "discussion with the Constable was separate from and no part of her expression of 'disapproval of the President's policies'." Br. for the United States at 18. This argument is frivolous. First, as noted in text, even without any context plaintiff's statement would be an expression of her political beliefs. Second, in any event, plaintiff's statement was made in a particular context, and although it is true that plaintiff did not restate her "disapproval of the President's policies" when meeting with the Constable, that is because she was given no opportunity to do so; she was merely asked whether she had made the statement attributed to her and whether she meant it, and was discharged on the basis of her affirmative answers to those two questions, without being afforded any opportunity to further explain the basis for her statement. If plaintiff's original statement, in context, was related to a matter of public concern, it cannot have lost that status simply because plaintiff was asked by the Constable to repeat the statement out of context.

eral would reach the opposite conclusion had plaintiff expressed a different position with respect to the subject she discussed (*e.g.*, if plaintiff had said "although I deplore the President's policies, I hope he is never shot at again"). This is nothing more than a dressed-up claim that plaintiff's views are so intolerable that they ought not be heard. And the Solicitor General's invitation to the courts to decide in each case whether "intellectual discourse is . . . advanced by [a particular] expression of sentiments" would arrogate to the judiciary a censorial power that runs contrary to the very essence of the First Amendment, *see* pp. 7-9 *supra* and cases cited thereat.[11]

The Solicitor General attempts to give his argument an illusion of substance by borrowing some of the observations the Court made in *Connick* with respect to the questionnaire involved in that case and attempting to

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[11] Because, as explained in text, the view plaintiff expressed and for which she was fired was tied to a matter of public concern—specifically to the administration's policies—it seems to us that plaintiff's statement of her view, however loathesome, cannot fairly be placed on a " 'subordinate position in the scale of First Amendment values,' " as the Solicitor General contends, Br. for the United States at 19, *quoting Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Nonetheless, we hasten to point out that *Connick* does *not* hold that public employees are protected from discharge only with respect to speech that " 'rest[s] on the highest rung of the hierarchy of First Amendment values,' " Br. for the United States at 15, quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980). To the contrary, the Court in *Connick, see, e.g.*, 461 U.S. at 149-50, treated one aspect of the questionnaire in that case as related to an issue of public concern—and thus as falling within *Pickering*—even though the Court did not view that aspect of the questionnaire as speech of the "highest rung". Rather, the Court held that "the nature of the employee's expression" (461 U.S. at 150) and, more specifically, "the value of Myers' speech" (*id.* at 152), were matters to be assessed and weighed in the *Pickering* balance after it was first determined that the speech related to a matter of public concern rather than a private grievance. If that threshold determination had itself entailed a finding that the speech "rest[ed] on the highest rung" of First Amendment values, it is difficult to see why any further weighing of the "value" of Myers' particular speech would have been called for.

apply those observations to the instant case. Thus, the Solicitor General asserts that plaintiff's statement

> has no potential for assisting the public "in evaluating the performance of the [President] as an elected official" (*Connick*, 461 U.S. at 148). Nor will it add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties, or "bring to light any actual or potential wrongdoing or breach of trust" on the President's part (*ibid*). "[I]f released to the public, [the remark] would convey no information at all" (*ibid.*), except, perhaps, that this individual would personally like to see the President removed from office. [Br. for the United States at 16.]

This argument wrenches *Connick's* words from their context.

In *Connick*, determining whether the speech in question related to a matter of public concern was complicated by the fact that the subject matter of the discussion was neither inherently public nor inherently private in nature; as the Court stated, "discipline and morale in the workplace are related to an agency's efficient performance of its duties" and thus "discussion of office morale and discipline could be matters of public concern," 461 U.S. at 148 & n.8,[12] but such discussions equally can be nothing more than a statement of a private grievance. To determine into which category the particular speech at issue in *Connick* fell, the Court looked to the factors the Solicitor General notes, such as the fact that the speech in question "convey[ed] no information at all" and did not "seek to bring to light actual or potential

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[12] *Cf. Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"; consequently "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution" as "labor relations are not matters of mere . . . private concern").

wrongdoing or breach of trust." But the fact that those considerations were relevant in *Connick* to resolve the ambiguity as to whether the subject matter of the speech in question in that case was a public issue or a private dispute does not mean that such factors can be used to deny First Amendment protection to statements that are addressed to "a matter inherently of public concern" (*Connick*, 461 U.S. at 148 n.8), merely because the statements are not informative in nature. Yet that is what the Solicitor General is necessarily contending.

Indeed, on the Solicitor General's theory, any expression of pure opinion—for example, a statement that "I disagree with Reagan administration policies"—would be, in the Solicitor General's words, "pure 'self-expression,' and not '[s]peech concerning public affairs' ", Br. at 16, because such statements of opinion, by definition, do not "assist[] the public 'in evaluating the performance of the [President]' ", or "add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties;" indeed, they "convey no information at all." The *only* speech that would seem to fit within the Solicitor General's definition of that which is of public concern would be reasoned statements of fact and argument that lead the speaker to a particular opinion. The First Amendment's commitment to "uninhibited, robust and wide-open debate"—including "vehement, caustic and unpleasantly sharp attacks" p. 8, *supra*—is not so limited; indeed, "however pernicious an opinion may seem," the First Amendment provides special sanctuary for the opinion's expression as "we depend for its correction . . . on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 339-40.[13]

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[13] *Connick* likewise rejects the Solicitor General's attempt to classify plaintiff's statement as private speech because it was made "in casual office conversation" and not "during a public rally or debate." Br. for the United States at 18. The Court in *Connick* expressly reaffirmed the lesson of *Givhan v. Western Line Consol. Sch. Distr.*, 439 U.S. 410 (1979), that if the subject matter of a

In sum, this is not a case like *Connick* in which "it is unnecessary for us to scrutinize the reasons for [plaintiff's] discharge." *Connick*, 461 U.S. at 146.

C. The *Pickering* Issue

The remaining question is whether, applying the balancing process outlined in *Pickering*, the Constable's action in discharging plaintiff can be sustained on the ground that it is justified by an overriding governmental interest. As we proceed to show, on the facts of this case, that question must be answered in the negative.

(1) The Constable seeks to justify the discharge on the ground that he must "have confidence" that those he employs "are in fact dependably doing their job" and that based on the view expressed by plaintiff, the Constable "lost all confidence in her." Pet. Br. at 13. In making this argument the Constable does not claim that anything about the time, place or manner of plaintiff's statement caused the Constable to question her judgment or her reliability; rather, the Constable relies solely on the *substance* of the view plaintiff holds, in the effort to justify the discharge.[14] The Constable argues, in essence, that one who holds such an admittedly extreme view cannot be trusted to perform the duties of the position for which plaintiff was hired. As we proceed to show, the Constable's argument does not withstand analysis.[15]

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statement touches upon a matter of public concern, constitutional protection "is not forfeited by [the] choice of a private forum." *Connick*, 461 U.S. at 148-49 n.8.

[14] In determining whether to discharge plaintiff, the Constable's concern was with whether she, in fact, held the view that had been attributed to her (*i.e.*, whether she "meant it"). That she had chosen to *express* that view in an office conversation was of no moment insofar as the Constable was concerned; he fired her because she "[said] to [him] direct" that her views were as had been reported. *See* n.4, *supra*.

[15] Insofar as the Constable is suggesting that the relevant question here is a purely subjective one—whether this Constable has lost confidence in this plaintiff—the argument sweeps way too far. Such an argument would allow any public employer to discharge

There can be no doubt, as previously shown, that "the right of freedom of thought [is] protected by the First Amendment," *Wooley v. Maynard*, *supra*, 430 U.S. at 714. It follows that as a general rule, "the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 10 (1971) (Stewart, J., concurring). And this general rule applies in the context of public employment: "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs." *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980).

The Court in *Branti* noted the limits of this rule: "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* Thus, for example, a white supremacist might constitutionally be denied a job as an equal employment counselor, and one who believes that incarceration is morally wrong might be denied a job as a prison guard.

But the sorry history of governmental efforts to exclude from public employment large numbers of citizens whose only "sin" was "to hold a point of view different from the majority," *Wooley v. Maynard*, *supra*, 430 U.S. at 715, is too recently emblazoned in our memory to allow broad range for the government to disqualify individuals from public employment based on the individual's views. It is too easy, and too common, for men to "fear[] witches and burn[] women," to use Justice Brandeis' memorable words. *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion). Thus, we believe the court of appeals articulated the appropriate test: "[a]b-

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any public employee based on any statement or opinion so long as the employer testifies that he no longer trusts the employee to do the job; indeed, a simple statement of opposition to the policies of the President could, conceivably, lead a particular Constable to lose confidence in the speaker's judgment.

sent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required." JA 136 (emphasis in original). As the appellate court explained:

> A large body of First Amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our First Amendment jurisprudence is a boast that in a free society, foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens there is all the more reason to recall its long-term benefits. [*Id.*]

Measured by this test, it is clear that the court of appeals correctly concluded that plaintiff was discharged unconstitutionally. As that court recognized, the "primary mission" of the Constable's office, in which plaintiff was employed, "is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars"; the office "has no direct law enforcement role." *Id.* at 130-31.[16] Moreover, plaintiff held an "entirely clerical," *id.* at 131, and "utterly ministerial," *id.* at 136, job in that office; "seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT," *id.* at 131.[17] It simply defies reason to believe that plaintiff could not be trusted to operate the CRT because she so opposed President Reagan's policies

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[16] "Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts." JA 131.

[17] *See also* JA 36 (district court opinion of April 15, 1983) ("Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct").

as to hope that if another assassination attempt were made it would succeed. As the court of appeals put it, "[h]owever ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office." *Id.* at 136.

(2) The Solicitor General suggests an alternative basis for concluding that the *Pickering* balance favors the state in this case, a basis that focuses not on plaintiff's reliability as a CRT operator but rather on the "public 'appearance' and 'reputation' " of the Constable's office. Br. for the United States at 21. Proceeding from the undeniable premise that "[a] law enforcement agency naturally has a strong and legitimate interest in maintaining the reputation and appearance of being fully committed to enforcement of the law," *id.* at 22-23, the Solicitor General contends that this interest justifies plaintiff's discharge as her "comment was completely inconsistent with the public appearance and reputation that the Constable rightfully sought to project," *id.* at 24.

(a) The governmental interest hypothesized by the Solicitor General is simply not implicated on the facts of this case. The Constable did not purport to fire plaintiff because her remark threatened public confidence in the agency. Rather, the Constable repeatedly testified that he fired plaintiff because, in the privacy of his office, plaintiff told him (in response to his question) that she, in fact, hoped an assassination attempt would succeed if it were made. *See* p. 20 and n.4, *supra*.[18] And the sole reason the Constable gave for the discharge is that he lost confidence in plaintiff; the Constable at no point expressed a fear that the plaintiff's views would become a matter of public knowledge and would embarrass his office. Thus, the Solicitor General is conjuring up con-

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[18] The Solicitor General's suggestion that by repeating her statement to the Constable plaintiff "verg[ed] on insubordination" is incomprehensible. *See* Br. for the United States at 24. Plaintiff truthfully answered questions posed by the Constable; if anything, it would have been insubordinate for plaintiff to have refused to answer, or to have answered falsely.

cerns that did not in fact motivate the discharge, and which therefore are not entitled to consideration in determining "whether [the Constable] was justified in discharging [plaintiff]." *Connick*, 461 U.S. at 149. *See also id.* at 154 (justification for discharge turns on what the employer "reasonably believed would [harm the agency's legitimate interests])"; *id.* at 146 (where a matter of public concern is involved, the court must "scrutinize the reasons for [the] discharge").

Furthermore, even if this *post hoc* justification for the discharge were to be entertained, the fact that it was not relied upon by the Constable in making his decision is perhaps the strongest proof that it is not a serious factor in the circumstances of this case. The record confirms this; there is no factual support for the Solicitor General's contention that plaintiff's remark threatened to injure confidence in the Constable's office.

In this regard, it is important to bear in mind that plaintiff did not engage in any act of public advocacy; the remark that led to her discharge was made in a private conversation with her boyfriend and was overheard by just one other employee. Thus, there was no reasonable likelihood that the remark would come to the attention of the public.[19] And, even if plaintiff's remark

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[19] The Solicitor General claims that there was a "substantial" risk that plaintiff's statement would be publicized because it was "the subject of discussion within the office" and because "the Constable quite responsibly decided to report the incident to the Secret Service." Br. for the United States at 26. But the fact that a few persons within the Constable's office discussed the remark hardly suggests that those individuals would disseminate the statement outside of the office (especially if, as the Solicitor General claims, such dissemination would threaten the reputation of the office). And although it is true that the Constable chose to notify the Secret Service of plaintiff's *non*-threatening statement, there is no evidence, or reason to believe, that the Secret Service would publicize the information it received from the Constable.

Finally, there is at least a tension between the Solicitor General's insistence that plaintiff's remark was "private" and not part of any

somehow were to be publicized, it could not reasonably be expected to adversely affect public confidence in the Constable's office. Despite all of the Solicitor General's talk about "law enforcement agenc[ies]," the fact of the matter is that, as the court of appeals stated, the Constable's office "has no direct law enforcement role" and its "primary mission is the service of process and execution of warrants," p. 22, *supra*. Furthermore, nothing in plaintiff's remark could reasonably be interpreted to suggest that she wished to interfere in any way with the ability of the Constable's office to carry out its public mission. And finally, it is difficult to see how the public could be misled into believing that plaintiff, as a CRT operator, was in a position to harm the mission of the agency even if she had a desire to do so. In sum, it is simply inconceivable that the public's confidence in the Constable's ability to serve process would be adversely affected if the public were somehow to learn of plaintiff's statement.

The Solicitor General's argument is based on sheer speculation, devoid of any concrete support (*see, e.g.*, note 19 *supra*). Where First Amendment rights hang in the balance, such speculation cannot sustain the government's position. *See, e.g., Wood v. Georgia*, 370 U.S. 375 (1962).

(b) For the reasons just discussed, this is not a case in which the interest of a government agency in preserving public confidence is implicated in any way. The Court is therefore not called upon to consider what weight, if any, such an interest should be given in the *Pickering* balance in cases where the interest is in fact threatened. It is sufficient to note that the analysis of such a case would be far more complex than the Solicitor General suggests.

"public . . . debate" (Br. at 18), and his contention that there was a "substantial" risk that the remark would constitute a focus of public attention (*id.* at 26).

What the Solicitor General is arguing, at bottom, is that even though the beliefs that a public employee holds and expresses are not in *fact* inconsistent with "the discharge of his public duties," *Branti v. Finkel*, *supra*, 445 U.S. at 517, the First Amendment nonetheless allows the public employer to discharge that employee if the employer reasonably fears that the public will *believe* (however erroneously) that the employee will not faithfully perform his duties or if the public will doubt the agency's commitment or capacity to carry out its function.[20] Such a doctrine threatens basis First Amendment values.

To begin with, the mere fact that the public objects to the views that a public employee holds or expresses cannot in itself justify suppression of speech; for it is the very purpose of the First Amendment to "protect[] the right of individuals to hold a point of view different from the majority," *Wooley v. Maynard*, *supra*, 430 U.S. at 715, and to do so "as to things that touch the heart of the existing order," *Board of Education v. Barnette*, *supra*, 319 U.S. at 642. At the least, then, if an asserted public reaction to the views of a public employee is to be considered in determining whether the employee's discharge is justified, it must be shown that the public reaction is based on a concern as to whether the employee will properly perform his duties, rather than on the public's mere distaste for the employee's views. *Cf. Spence v. Washington*, 418 U.S. 405, 412 (1974); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Even if one could somehow be satisfied that the public's adverse reaction to an employee's expressed views was predicated on legitimate concerns rather than on ideological considerations, it would remain problematic

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[20] If the employee's views are *in fact* inconsistent with the proper performance of his duties, a discharge will be justified on that basis, and there will be no reason to look to public perceptions. Thus the Solicitor General's argument as to the relevance of public perceptions will only come into play in cases where the employee's views are not in fact inconsistent with the proper performance of his duties.

whether the public's *erroneous* conclusion as to the employee's fitness for duty (*see* n.20 *supra*) should be deemed to "justif[y] [the employer] in discharging [the employee]." *Connick*, 461 U.S. at 149. The public employer, after all, can vindicate its reputation by demonstrating to the public the employee's continued fitness for duty rather than succumbing to the public perception and firing the employee; that solution would accord with the general First Amendment principle that the solution to misperceptions is "more speech, not enforced silence." *Whitney v. California*, *supra*, 274 U.S. at 377 (Brandeis, J., concurring), At the very least, before allowing public misperceptions to be accepted as a justification for firing an employee for his speech, it would be necessary to consider such factors as the extent of harm actually caused to the agency by the public's misconception, the extent to which the employer may have contributed to that misconception, and the efforts the employer has made or can make to dispel the misconception.

These and related issues would all have to be considered if this were a case in which there was a real risk that the public would lose confidence in the Constable's office because of plaintiff's remark. But as we have shown, this is not such a case, and thus the issues tendered by the Solicitor General regarding the role that the "public 'appearance' and 'reputation'" of an agency should play in such a case are matters to be left for another day.

(3) One final word is in order. Running through the Solicitor General's discussion of the need to protect a public employer's "reputation" and "appearance" are broad and amorphous statements of "the government's interest in prescribing minimum standards of acceptable speech and conduct for its employees," "the agency's need to foster proper attitudes among its workers," and the importance of requiring all employees to "abide by the agency's minimum standards of decorum and professionalism." Br. for the United States at 27-28. The

Solicitor General further insists that these "minimum standards" should not "var[y] with the 'employee's role in the [agency],'" *id.* at 27. It is difficult to determine what limitations the Solicitor General would recognize on the government's asserted power to require "acceptable speech," "proper attitudes," and "decorum" on the part of all employees. But, to the extent that the Solicitor General suggests that such "minimum standards" can be applied to proscribe speech or beliefs which do not threaten tangible harm to the agency, that suggestion is foreclosed by this Court's precedents.

For example, this Court's decisions with respect to public employee loyalty oaths do not support the proposition that public employees can be required to declare in general terms their "loyalty to the Government" or even their "belief in the form of the Government of the United States," *Law School Research Council v. Wadmond*, 401 U.S. 154, 162 (1971); rather, as early as *Speiser v. Randall*, 357 U.S. 513, 527 (1958), it was recognized that oath statutes are constitutional only to the extent that they are designed "to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public." And the Court's most recent word on that precise subject teaches that under the First Amendment the legitimate function of a properly tailored loyalty oath is not to ensure that employee beliefs and attitudes meet some "minimal standard" devised by the agency, but rather to deny employment to persons who will not agree "to perform [their] public duties lawfully," *Cole v. Richardson*, 405 U.S. 676, 682 (1972), or who will not agree "not to use illegal and constitutionally unprotected force to change the constitutional system . . .," *id.* at 684. *See also* cases cited in *Communist Party of Indiana v. Whitcomb, supra.*

All of these cases make it clear that an employee may not be discharged for running afoul of an agency's conception of "acceptable speech" or "proper attitudes" (Br. for the United States at 27-28), unless the employee's

views will lead to concrete harm that the government may constitutionally prohibit.[21] Because no such showing was made here, the court of appeals correctly held plaintiff's discharge to be unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
CYNTHIA L. ESTLUND
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)
Attorneys for Amicus Curiae
National Education Association

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[21] In determining whether such a threat of harm exists, it is no new learning to recognize that the nature of the employee's duties is highly significant. *See, e.g., Branti v. Finkel, supra; United States v. Robel*, 389 U.S. 258, 266 and n.17 (1967).